In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 873

JOSEPH COLOZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum order of the court of appeals (Pet. Appendix) is not reported.

JURISDICTION

The order of the court of appeals was entered on October 25, 1966. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to December 23, 1966, and on December 16, 1966, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, an interlocutory order denying an indefinite stay of trial was reviewable in a court of appeals.

STATEMENT

On February 2, 1962, the government filed an information in the United States District Court for the Eastern District of New York charging petitioner, in three counts, with filing false statements in labor union reports in violation of 29 U.S.C. 431(a) and 439(b). From time to time the case was continued because of petitioner's alleged illness and inability to stand trial. On February 17, 18 and 23, 1966, upon motion of the government, a pre-trial hearing was held to determine the exact nature and extent of petitioner's disability.

At this hearing, several medical reports relating to peitioner's illness, two of which had been prepared by a government and court-appointed physician, respectively, indicated that petitioner was a Class IV cardiac patient with a 90 percent disability, and that, in his present condition, it would be dangerous for him to stand trial.[1] On the other hand, non-medical evidence tended to show that petitioner was seemingly less disabled than the condition reflected in these reports. It was shown that during the time he was allegedly 90 percent disabled, he held eleven different positions with the International Longshoreman's Association (R. 6–7).[2] For these services, which required

[1] The medical reports are not included in the record on appeal filed with the Clerk of this Court. These reports are summarized, however, in the memorandum of the district court at pages 443–445, 445–447, 448–450, and 451–452 of the record on appeal.

[2] Petitioner was president of Local 1277 of the International Longshoreman's Association (ILA); member of the executive board of Local 1277; delegate to the district council from Local

continual contact with union members and periodic meetings (R. 71–72), petitioner received approximately $22,500 (R. 12). During November and December of 1963, petitioner, in his capacity as a principal labor negotiator, attended five collective bargaining sessions (R. 24), and he attended twelve more similar sessions during the year 1964 (R. 27–29). It was also shown that during the three years immediately preceding the hearing, petitioner had attended approximately sixty different business meetings in the New York City area (R. 37), and numerous social functions (*e.g.*, R. 77–84). He travelled to Baltimore for an executive committee meeting (R. 34), and flew to Miami Beach for an ILA national convention (R. 34). Despite his illness, petitioner continued to drive his own automobile (R. 111–112, 310).

Upon conclusion of the hearing, at which petitioner himself was interrogated for approximately fifteen minutes by the court in chambers, Judge Rosling, to whom this matter had been referred, expressed extreme difficulty in reconciling the medical testimony with petitioner's numerous activities. Nevertheless, on April 18, 1966, the court granted a continuance until the fall calendar. Recognizing the difficulty imposed upon the government in proving the negative

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1277; delegate at large to the national convention of the ILA; vice-president of the Atlantic Coast District of ILA; organizer employed by the ILA; Union Trustee of the Metro ILA Welfare Fund; Union Trustee of the Metro ILA Pension Fund; Union Trustee of the New York Shipping Association ILA Medical and Clinical Services Fund; Union Trustee of the New York Shipping Association ILA Containerization Fund; and Union Member of the New York Shipping Association ILA Medical Center of New York (R. 7–8).

of petitioner's assertion that he was unable to stand trial, and taking into account the fact that petitioner had the burden of proving his inability to stand trial, the court conditioned that continuance upon the requirement that petitioner file with the United States Attorney, on a monthly basis, a "diary" summarizing his daily activities (R. 440–478, 479–480). A notice of appeal from that order was filed by petitioner on April 28, 1966. Petitioner thereafter refused to file the monthly reports (R. 305). On June 2, 1966, Judge Rosling granted the government's motion for a trial date, subject, however, to final consideration by the trial court (R. 407, 499).

On September 12, 1966, petitioner moved for an order indefinitely staying the trial on the ground of petitioner's continuing illness. That motion was denied by Judge Rosling, and a notice of appeal was filed. On September 26, 1966, the government moved the court of appeals to dismiss the appeals from the April 18 and September 12 orders for lack of appellate jurisdiction. In opposition, petitioner orally moved for leave to file a petition for a writ of mandamus, directing the district court indefinitely to stay the trial of the case. On October 25, 1966, the court of appeals dismissed both appeals on grounds of non-appealability (28 U.S.C. 1291), denied a motion to consolidate, and denied leave to file a petition for a writ of mandamus (Pet. Appendix).

ARGUMENT

1. A reading of Judge Rosling's thorough and meticulously detailed memorandum (R. 440–478),

summarizing all medical and non-medical evidence introduced in the pre-trial hearing, reflects his sympathetic concern with the condition of petitioner's health and the problem that it presents here. Only after thorough deliberation did that court order a conditional continuance until fall 1966. As noted in the accompanying memorandum, the medical testimony (which to some extent had to rely on petitioner's description of his symptoms) was counterbalanced by several factors, including petitioner's numerous physical activities during the period of his alleged disability, his endurance of the three days of the pre-trial hearing without any noticeable difficulty (R. 455–456), and the relatively short and uncomplicated trial which would be required to try the allegations of the information (R. 462–463). As Judge Rosling indicated, all these circumstances induced him to question the infallibility of the medical opinions "when stubborn fact registers dissent" (R. 458).

Under the circumstances presented here, there is no reason to depart from the well established rule, embodied in 28 U.S.C. 1291, prohibiting appeals from interlocutory orders, including orders denying an indefinite stay of trial on account of the alleged illness of the defendant. See *Scholl* v. *Felmont Oil Corporation,* 327 F. 2d 697, 699–700 (C.A. 6); *Bedgisoff* v. *Cushman,* 12 F. 2d 667, 667–668 (C.A. 9). *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541, 546, and *Stack* v. *Boyle,* 342 U.S. 1, 6, cited by petitioner, are inapposite to the facts of this case, since both those cases concerned appeals from collateral orders which finally determined rights which were independent of the trial

itself. Whether or not to grant a continuance is committed to the sound discretion of the trial court, *Isaacs* v. *United States,* 159 U.S. 487, 489; *Goldsby* v. *United States,* 160 U.S. 70, 72, and it would unduly delay criminal proceedings in violation of the "final judgment" policy of the Judicial Code if defendants could obtain review in a court of appeals whenever a request for a delay of trial were denied.

2. For the reasons set forth above, the court below also properly denied petitioner leave to file a petition for a writ of mandamus to direct the trial court to stay the trial indefinitely. It is well settled that mandamus should not issue to control a district court's exercise of discretion. *In re Blake,* 175 U.S. 114, 117; *In re Rice,* 155 U.S. 396; *In re Parsons,* 150 U.S. 150. Petitioner attempts to circumvent this rule by alleging that the district court's discretion was abused in this case. It should be noted that, however, that contrary to petitioner's suggestion (Pet. 6–7), the lower court's denial of an indefinite stay did not compel petitioner to stand trial immediately. When the government moves to set a trial date, petitioner is not foreclosed from demonstrating (if he is able to do so) that his physical condition would prevent him from standing trial. The order merely deprives him of the shelter of an indefinite stay of trial, under which he would not have to make any showing of a continuing disability. Moreover, the trial judge was fully justified in providing, as a condition of petitioner's requested continuance, that petitioner furnish a record of his activities so that court and the government could be apprised of any changes in his condition

which would bear on his ability to stand trial. Petitioner, who refused to comply with this reasonable request, is hardly in a position to argue that, regardless of his activities, he is entitled to an indefinite stay of trial.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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